



The following constitutes
the order of the court. Signed October 12, 2012

M. Elaine Hammond

M. Elaine Hammond
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
WILLIAM EDGAR DAVIS,

Case No. 10-74245 MEH
Chapter 7

Debtor/

ZELMA STENNIS AND
KEVIN STENNIS,

Adv. No. 11-04066 AH

Plaintiffs

v.

WILLIAM EDGAR DAVIS,

Defendant/

MEMORANDUM DECISION

On September 10, 2012 the court held a hearing on the motions
for summary judgment filed by each party on August 8, 2012.

The court took the matters under advisement to review the
documents. For the reasons that follow, Plaintiffs' motion for
partial summary judgment is granted in part and denied in part and
Defendant's motion for summary judgment is denied.

1 A. Background

2 Plaintiff Zelma Stennis filed a lawsuit in Los Angeles County
3 Superior Court against Defendant. Her third amended complaint
4 included causes of action for fraud, violation of Elder Abuse and
5 Dependent Adult Civil Protection Act, conversion, intentional and
6 negligent tortious interference with prospective economic
7 relations, negligence, breach of fiduciary duty, negligent and
8 intentional infliction of emotional distress, injunctive relief,
9 quiet title, cancellation of instrument, declaratory relief/setoff,
10 and injunctive relief.

11 In her complaint Plaintiff Zelma Stennis alleged that Defendant,
12 while not a real estate agent or broker, requested that she allow
13 him to find a buyer for her Los Angeles property. For a period of
14 18 months Defendant did not secure a buyer and Plaintiff Zelma
15 Stennis hired a licensed real estate broker. Aside from ordering a
16 temporary rental fence at \$115/month for 4 months, Defendant had
17 not improved the property, but placed and recorded a mechanics lien
18 on the property on December 18, 2006.

19 The Superior Court conducted a jury trial. Following trial, the
20 jury returned a verdict in Plaintiff Zelma Stennis' favor; issuing
21 a special verdict on July 22, 2010.
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1 The Superior Court further awarded Plaintiff Zelma Stennis
2 attorney fees and costs in the amount of \$213,499.62. Defendant
3 did not appeal the judgment or the fee order.

4 Defendant filed his petition under Chapter 7 on December 13,
5 2010. Plaintiffs timely filed their complaint to determine
6 dischargeability and object to discharge. They subsequently
7 amended it twice. The third amended complaint ("Complaint") was
8 filed December 15, 2011.
9

10 This court has subject matter jurisdiction of this proceeding
11 under 28 U.S.C. §1334. This is a core proceeding under 28 U.S.C.
12 §157(b)(2)(I).

13 B. Discussion

14 1. Summary Judgment Standard

15 Summary judgment is appropriate when there exists "no genuine
16 issue as to any material fact and the moving party is entitled to
17 judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Fed.
18 R. Bankr.P. 7056 (establishing that Rule 56 applies to adversary
19 proceedings).
20

21 The Supreme Court discussed the standards for summary judgment in
22 a trilogy of cases, *Celotex Corporation v. Catrett*, 477 U.S. 317,
23 327 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986),
24 and *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 477
25 U.S. 574 (1986). A fact is material if it might affect the outcome
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1 of a proceeding under the governing substantive law. In a motion
2 for summary judgment, the moving party bears the initial burden of
3 persuasion in demonstrating that no issues of material fact exist.
4 *Anderson* 477 U.S. at 255. A genuine issue of material fact exists
5 when the trier of fact could reasonably find for the non-moving
6 party. *Id.* at 248. The court may consider pleadings, depositions,
7 answers to interrogatories and any affidavits. *Celotex* 477 U.S. at
8 323. Where the movant bears the burden of persuasion as to the
9 claim, it must point to evidence in the record that satisfies its
10 claim. *Id.* at 252. In determining whether the movant has met its
11 burden, the court should consider all reasonable inferences in a
12 light most favorable to the non-movant. *Matsuhita* 477 U.S. at 588.

13
14 2. Plaintiffs' Motion For Summary Judgment

15 Plaintiffs claim that they are entitled to summary judgment
16 based on collateral estoppel of the state court judgment obtained
17 by Plaintiff Zelma Stennis.

18
19 Collateral Estoppel Standard

20 The doctrine of collateral estoppel applies in bankruptcy
21 dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 285
22 n.11 (1991). In determining whether a party should be estopped from
23 relitigating an issue decided in a prior state court action, the
24 bankruptcy court must look to that state's law of collateral
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1 estoppel. *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800
2 (9th Cir.1995).

3 Under California law, collateral estoppel requires that (1) the
4 issue sought to be precluded from litigation must be identical to
5 that decided in the former proceeding; (2) the issue must have been
6 actually litigated in the former proceeding; (3) the issue must
7 have been necessarily decided in the former proceeding; (4) the
8 decision in the former proceeding must have been final and on the
9 merits; and (5) the party against whom preclusion is sought must be
10 the same as, or in privity with, the party to the former
11 proceeding. *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001)
12 (citation omitted).
13

14 Collateral Estoppel Argument Does Not Apply To Plaintiff Kevin
15 Stennis
16

17 The Complaint seeks a determination of non-dischargeability as
18 to costs awarded to Kevin Stennis by the state court. The Superior
19 Court's September 6, 2011 minute order indicates that \$610 in costs
20 were awarded to Kevin Stennis for defending against Defendant's
21 cross-complaint that was voluntarily dismissed on October 14, 2008.
22

23 Plaintiff Kevin Stennis was not a party to the underlying state
24 court action commenced by Plaintiff Zelma Stennis that constitutes
25 the basis for Plaintiffs' collateral estoppel argument. The fee
26 award in favor of Kevin Stennis relates only to an unsuccessful

1 cross-complaint that was never litigated, but voluntarily dismissed
2 by Defendant.

3 Therefore, the facts and issues underlying the fee award are not
4 identical with the issues in this adversary proceeding.

5 Thus, collateral estoppel does not apply to Kevin Stennis'
6 claim; summary judgment is denied as to Kevin Stennis.

7 Hence, the following discussion, focuses only on summary
8 judgment as to Plaintiff Zelma Stennis ("Plaintiff").

9
10 The Elements of a Cause of Action for Intentional Infliction of
11 Emotional Distress Are Substantively Equivalent to the Requirements
12 of §523(a)(6)

13 To determine whether the state court judgment is entitled to
14 collateral estoppel effect, the court must first determine whether
15 the cause of action for intentional infliction of emotional
16 distress is similar enough to the Bankruptcy Code's¹ §523(a)(6)
17 standard for collateral estoppel to apply. If collateral estoppel
18 applies, Defendant is precluded from rearguing any material issues
19 of fact, and summary judgment can be entered for Plaintiff.

20
21 Section 523(a)(6) provides that any debt "for willful and
22 malicious injury by the debtor to another entity or to the property
23 of another entity" is nondischargeable. The type of debts excluded
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26 ¹ Unless specified otherwise, all chapter and section references are to the
Bankruptcy Code, 11 U.S.C. §§101 *et seq.*, and all "Rule" references are to the
Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 from discharge under §523(a)(6) are limited to intentional tort
2 debts. *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998).

3 For purposes of §523(a)(6) nondischargeability, the bankruptcy
4 court must find the injury inflicted by the debtor was both
5 "willful" and "malicious." *Matter of Ormsby*, 591 F.3d 1199, 1206
6 (9th Cir. 2010). See also *In re Barboza*, 545 F.3d 702, 711 (9th
7 Cir. 2008).

8 Willful injury within the meaning of §523(a)(6) means
9 "deliberate or intentional." *Kawaauhau v. Geiger*, 523 U.S. 57, 61
10 n.3 (1998). This requirement is met when the creditor shows that
11 the debtor either had a subjective motive to inflict the injury or
12 that the debtor believed the injury was substantially certain to
13 occur as a result of his or her conduct. *In re Jercich*, 238 F.3d
14 1202, 1208 (9th Cir. 2001).

15 A "malicious injury" under §523(a)(6) involves a wrongful act;
16 done intentionally; that necessarily causes injury; and that is
17 committed without just cause or excuse. *Id.* at 1209. See *In re*
18 *Thiara*, 285 B.R. 420, 427 (B.A.P. 9th Cir. 2002).

19 The state court complaint included a cause of action for
20 intentional infliction of emotional distress.

21 Case law supports the application of collateral estoppel to a
22 state court judgment for intentional infliction of emotional
23 distress. See *In re Elder*, 262 B.R. 799, 808 (C.D. Cal. 2001); *In*
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1 re Lee, 2011 WL 841247 (Bankr. N.D. Cal. Mar. 7, 2011); see also
2 Robinson v. Louie (*In re Louie*), 213 B.R. 754, 758-59 (Bankr. N.D.
3 Cal. 1997); *Impulsora Del Territorio v. Cecchini (In re Cecchini)*,
4 780 F.2d 1440, 1443 (9th Cir.1986).

5 Under California law, the elements of intentional infliction of
6 emotional distress are "(1) extreme and outrageous conduct by the
7 defendant with the intention of causing, or reckless disregard of
8 the probability of causing, emotional distress; (2) the plaintiff's
9 suffering severe or extreme emotional distress; and (3) actual and
10 proximate causation of the emotional distress by defendant's
11 outrageous conduct." *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th
12 Cir. 2004). (4) The conduct must be "directed at plaintiff, or
13 occur in the presence of a plaintiff of whom defendant is aware."
14 *Christensen v. Superior Court*, 54 Cal.3d 868, 903 (1991) (en banc)
15 (quotations and citations omitted).
16
17

18 Intentional infliction of emotional distress is a tort under
19 California law. "Tortious conduct under state law is necessarily
20 wrongful." See *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th
21 Cir.2008). Thus, the jury verdict establishes debtor committed a
22 wrongful act.
23

24 The jury further found that Defendant's conduct was outrageous
25 and he intended to cause Plaintiff emotional distress. The jury
26 concluded that Defendant's conduct was a "substantial factor" in

1 the severe emotional distress Plaintiff suffered. Thus,
2 Defendant's conduct necessarily caused injury.

3 Finally, there was no indication of just cause or excuse. Thus,
4 the issue to be decided under §523(a)(6) is the same as in the
5 former proceeding under intentional infliction of emotional
6 distress.

7 Collateral estoppel further requires that a matter was actually
8 litigated and necessarily decided. The Superior Court held a jury
9 trial in the underlying case. The jury's Special Verdict
10 identifies the conclusions it made from the evidence presented. The
11 court concludes on this record that the elements of the §523(a)(6)
12 claim were actually litigated and necessarily decided in the
13 Superior Court.
14

15 The state court judgment is also final and on the merits. A jury
16 found Defendant liable for intentional infliction of emotional
17 distress, a judgment was entered against Defendant, and Defendant
18 did not appeal the judgment within the required period. Defendant
19 is the same defendant as in the state court proceeding. Thus, all
20 elements of collateral estoppel are satisfied.
21

22 Collateral estoppel can be invoked as to the amount of the debt
23 owed by Defendant. See *Sasson v. Sokolof (In re Sasson)*, 424 F.3d
24 864, 872 (9th Cir. 2005). Punitive damages may fall within the
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1 scope of "any debts" under §523(a). See *Cohen v. De La Cruz*, 523
2 U.S. 213, 220-21 (1998) (interpreting "any debt for" fraud under
3 §523(a)(2)(A) to mean any liability arising from or on account of
4 debtor's fraud, including a treble damages award for the fraud).

5 The jury found damages against Defendant for intentional
6 infliction of emotional distress in the amount of \$85,000.00,
7 consisting of future non-economic losses and punitive damages of
8 \$8,103.18. The state court entered a judgment for this amount and
9 that judgment is now final. Defendant is therefore precluded from
10 arguing this amount of debt.

11
12 Plaintiff is entitled to judgment as a matter of law in the
13 amount of \$93,103.18. The debt is nondischargeable under 11 U.S.C.
14 § 523(a)(6).

15 The Elements of a Cause of Action for Intentional
16 Misrepresentation And Concealment Are Substantively Equivalent to
17 the Requirements of §523(a)(2)(A)

18
19 *Intentional Misrepresentation*

20 Pursuant to §523(a)(2)(A), a monetary debt is nondischargeable
21 to the extent obtained by false pretenses, a false representation,
22 or actual fraud.

23
24 To establish that the debt is nondischargeable, Plaintiffs must
25 show that (1) the debtor made the representations; (2) at the time
26 he knew they were false; (3) he made them with the intention and

1 purpose of deceiving the creditor; (4) the creditor relied on such
2 representations; and (5) the creditor sustained alleged loss and
3 damage as the proximate result of such representations. *In re*
4 *Diamond*, 285 F.3d 822, 827 (9th Cir. 2002) (citations omitted).

5 Ninth Circuit case law confirms that the elements of fraud under
6 California law match the ones under §523(a)(2)(A). *Younie v. Gonya*
7 (*In re Younie*), 211 B.R. 367, 373-74 (B.A.P. 9th 1997) ("The
8 elements of §523(a)(2)(A) 'mirror the elements of common law fraud'
9 and match those for actual fraud under California law."). *See also*
10 *Baldwin v. Kirkpatrick (In re Baldwin)*, 245 B.R. 131, 134 (B.A.P.
11 9th Cir. 2000).

12 According to the special verdict the jury found the following
13 elements on the state court intentional misrepresentation claim:
14 (1) False representation of an important fact; (2) Defendant knew
15 the representation was false or he made the representation with
16 reckless disregard for its truth; (3) Defendant intended Plaintiff
17 to rely on the representation; (4) Plaintiff reasonably relied on
18 the representation; (5) Plaintiff's reliance on Defendant's
19 representation was a substantial factor in causing harm to her; and
20 (6) Non-economic damages (including physical pain, mental
21 suffering) resulted. In addition, the jury awarded punitive
22 damages.
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1 Thus, the state court judgment for intentional misrepresentation
2 is sufficiently identical with the issues under §523(a)(2)(A) to
3 establish nondischargeability by collateral estoppel. The amount
4 of \$20,000 is found to be non-dischargeable.

5 *Concealment*

6 Plaintiff also relies on the state court judgment for
7 concealment for her collateral estoppel argument.

8
9 Fraud under §523(a)(2)(A) means actual fraud. The term "actual
10 fraud" was added as a ground for exception from discharge with
11 enactment of the Bankruptcy Code and "[w]hatever doubt there may
12 have been prior to the enactment of the Code that fraud may consist
13 of concealment or intentional nondisclosure as well as affirmative
14 misrepresentations of material facts, is clearly dispelled by the
15 addition of the term 'actual fraud' in §523(a)(2)(A)." *In re*
16 *Evans*, 181 B.R. 508, 515 n.6 (Bankr. S.D. Cal. 1995). It is, thus,
17 "well recognized that silence, or the concealment of a material
18 fact, can be the basis of a false impression which creates a
19 misrepresentation actionable under §523(a)(2)(A)." *Id.* at 514-15.
20 *See In re Daquila*, 2011 WL 3300197 (B.A.P. 9th Cir. Feb. 28, 2011)
21 ("A debtor's failure to disclose material facts constitutes a
22 fraudulent omission under § 523(a)(2)(A) if the debtor was under a
23 duty to disclose and possessed an intent to deceive."); *In re*
24 *Miller*, 310 B.R. 185, 196 (Bankr. C.D. Cal. 2004) ("The concealment
26

1 or omission of material facts that a party has a duty to disclose
2 can support the nondischargeability of a debt on the grounds of
3 actual fraud.").

4 To show actual fraud the plaintiff must prove that 1) defendant
5 made a misrepresentation, concealment, or non-disclosure of a
6 material fact; 2) defendant had knowledge that what he was saying
7 was false; 3) defendant intended to induce plaintiff's reliance; 4)
8 plaintiff justifiably relied; and 5) plaintiff suffered damage as a
9 result. *Odorizzi v. Bloomfield School Dist.*, 246 Cal.App.2d 123,
10 128-129 (Cal. Ct. App. 1966); Cal. Civ. Code § 1572.

11 Here, the jury found that Defendant intentionally failed to
12 disclose an important fact that Plaintiff did not know and could
13 not reasonably have discovered, Defendant intended to deceive her
14 by concealing the fact, Plaintiff relied on Defendant's deception
15 and her reliance was reasonable under the circumstances,
16 defendant's concealment was a substantial factor in causing harm to
17 her, and Plaintiff suffered past non-economic loss (including
18 physical pain/mental suffering) in the amount of \$20,000.

19 Thus, the state court judgment for concealment is sufficiently
20 identical with the issues under §523(a)(2)(A) and the amount of
21 \$20,000 is non-dischargeable as well.
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1 The Elements of a Cause of Action for Breach of Contract Are Not
2 Substantively Equivalent the requirements of §523(a)(4)

3 Section 523(a)(4) excludes from discharge any debt "for fraud or
4 defalcation while acting in a fiduciary capacity, embezzlement, or
5 larceny."

6 Plaintiff relies on the state court judgment for breach of
7 fiduciary duty to establish collateral estoppel. When the
8 nondischargeability complaint is based on fraud or defalcation in a
9 fiduciary relationship, the creditor must prove that 1) defendant
10 was acting in a fiduciary capacity; and 2) while acting in that
11 capacity, he engaged in fraud or defalcation. *In re Stanifer*, 236
12 B.R. 709, 713 (B.A.P. 9th Cir. 1999).

13 For purposes of §523(a)(4), the fiduciary relationship requires
14 (1) an express or technical trust; (2) the trust must exist prior
15 to wrongdoing; (3) state law must clearly define fiduciary duties
16 and identify trust property; and (4) an identifiable trust res. *In*
17 *re Honkanen*, 446 B.R. 373, 378-80 (B.A.P. 9th Cir. 2011).

18 According to the state court complaint, Defendant - while not a
19 real estate agent or broker - requested that Plaintiff allow him to
20 find a buyer for her Los Angeles property. For a period of 18
21 months Defendant did not secure a buyer and Plaintiff then hired a
22 licensed real estate broker.
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1 The jury found that Defendant owed Plaintiff a fiduciary duty as
2 an agent business manager (financial advisor). He breached that
3 fiduciary duty; harming Plaintiff as a result. Defendant's conduct
4 was a substantial factor in causing her harm, and that Plaintiff
5 incurred past non-economic damages in the amount of \$250,000. The
6 jury also awarded punitive damages.

7 The crucial question for this court is whether Defendant's
8 fiduciary status determined to be an agent business
9 manager/financial advisor qualifies as fiduciary under §523(a)(4).
10 In bankruptcy, breach of a fiduciary duty is defined narrowly. The
11 broad definition of fiduciary under state law – "a relationship
12 involving trust, confidence, and good faith – is inapplicable in
13 the dischargeability context." *In re Cantrell*, 329 F.3d 1119, 1125
14 (9th Cir. 2003).
15

16 In a recent case involving a real estate licensee, the Ninth
17 Circuit found: "General fiduciary obligations are not sufficient
18 to fulfill the fiduciary capacity requirement in the absence of a
19 statutory, express, or technical trust." *In re Honkanen*, 446 B.R.
20 373, 381 (B.A.P. 9th Cir. 2011). Defendant was an unlicensed
21 financial advisor. There is no state law establishing duties or
22 related trust property for financial advisors. Defendant did not
23 hold any property in trust. The state court complaint does not
24 allege that Defendant ever held any property (a trust res) for
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1 Plaintiff. The complaint merely stated that Defendant acted "as
2 Plaintiff's agent to sell the property." As stated above, general
3 fiduciary obligations (a relationship involving trust, confidence,
4 and good faith) are not sufficient to fulfill the fiduciary
5 capacity requirement in the absence of a statutory, express, or
6 technical trust. Here, there was no trust due to the lack of a
7 trust res.

8
9 In the absence of a trust res, there was no express, technical
10 or statutory trust formed between Defendant and Plaintiff.
11 Consistent with the reasoning and holding of *Honkanen*, Defendant
12 was not acting in a fiduciary capacity as required by §523(a)(4).
13 Accordingly, the Plaintiff's state court judgment against Defendant
14 for breach of fiduciary duty in the amount of \$250,000 is
15 dischargeable.

16
17 The Court is Unable to Determine the Amount of Attorney's Fees
18 Relating to Nondischargeable Claims

19 The Superior Court awarded attorney's fees in the amount of
20 \$213,499.62 (according to Superior Court's minute order dated
21 September 23, 2011). Plaintiff seeks to have this award determined
22 non-dischargeable.

23
24 In the context of §523(a)(2)(A) the U.S. Supreme Court held that
25 "'any debt ... for money, property, services, or ... credit, to the
26 extent obtained by' fraud encompasses any liability arising from

1 money, property, etc., that is fraudulently obtained, including
2 treble damages, attorney's fees, and other relief that may exceed
3 the value obtained by the debtor." *cohen v. de la Cruz*, 523 U.S.
4 213, 223 (1998).

5 The Ninth Circuit BAP extended the *Cohen* holding to §523(a)(6)
6 stating that "[e]stablished case law holds that a debtor's
7 obligation for attorneys fees and costs is excepted from discharge
8 under section 523(a)(6) as a 'debt for' debtor's willful and
9 malicious injury when awarded by the state court 'with respect to'
10 or 'by reason of' the same underlying conduct that precluded
11 discharge of the underlying compensatory damages award." *In re*
12 *Suarez*, 400 B.R. 732, 738-39 (B.A.P. 9th Cir. 2009). *See also In*
13 *re Hughes*, 2007 WL 2456072 (Bankr. E.D. Cal. Aug. 24, 2007) (case
14 involved "unreasonable, frivolous, and vexatious" complaint).
15

16 Here, according to the Superior Court's minute order dated
17 September 6, 2011 the attorney fee clause was included in the
18 promissory note. The minute order further determined that "[t]he
19 jury findings against Defendant for . . . , intentional infliction
20 of emotional distress, . . . , and breach of fiduciary duty had some
21 relationship with this promissory note" (that included the attorney
22 fee provision). Therefore, the portion of the attorney fee award
23 attributable to fees incurred in establishing non-dischargeable
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1 claims pursuant to §523(a)(6) and §523(a)(2)(A) is also non-
2 dischargeable.

3 The court is not convinced that the evidence presented is
4 sufficient to allocate the attorney fee award attributable to the
5 non-dischargeable claims. The court will set a status conference
6 to address this limited issue.

7
8 3. Defendant's Motion for Summary Judgment

9 As part of his motion for summary judgment Defendant reiterates
10 the arguments he made in his opposition to Plaintiffs' motion for
11 summary judgment.

12 Defendant argues with respect to §523(a)(2)(A) that Plaintiffs
13 fail to plead fraud with particularity, further that the state
14 court judgment for punitive damages was unsupported by the law, and
15 that Plaintiffs will not be able to produce any evidence to support
16 their claims. Also, Defendant repeatedly makes an argument with
17 respect to the lack of any economic loss by Plaintiff, which the
18 court finds difficult to understand.

19
20 In summary, Defendant is essentially listing several reasons why
21 Plaintiffs will not succeed with their motion. However, he does
22 not submit an argument or a legal basis upon which his summary
23 judgment motion should be granted. The court being unable to find
24 such basis, Defendant's motion for summary judgment is denied.
25
26

Conclusion

For the reasons discussed above, Plaintiffs' motion for summary judgment is granted in part and denied in part. Plaintiff Zelma Stennis is entitled to judgment of a non-dischargeable claim against Defendant in the amount of \$133,103.18, plus allocable attorney's fees. The court will issue a separate judgment following further proceedings on the attorney's fees issue.

Concurrently with this Memorandum Decision the court is issuing an order denying Defendant's motion for summary judgment.

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